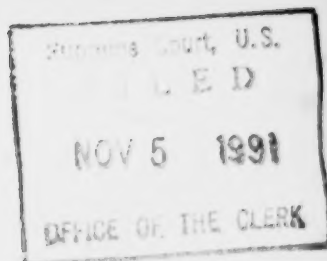


Case No. - 91-271



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN MALINOVSKY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

JONATHAN E. ROSENBAUM
Counsel of Record
Chief Counsel, Criminal Division
GREGORY A. WHITE
Lorain County Prosecutor
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035
(216) 329-5393

COUNSEL FOR RESPONDENT



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STATEMENT OF THE CASE

The Petitioner's Statement of the Case is chronologically accurate. However, it is incomplete in a most significant way: It creates the impression that the Petitioner was in no way responsible for nor did he "request" or cause the dismissal of this case in the trial court. This is absolutely incorrect.

The State of Ohio's entire case was predicated upon the statements of co-conspirator, Wayne Long, made in the furtherance of the conspiracy. These statements implicated the Petitioner. Indeed, these statements were the extortionate acts which threatened to intimidate the fire inspectors into overlooking the fire code violations experienced by the Petitioner's daughter,



as President of the S.P.C.A.

The Petitioner was acutely aware of this crucial evidence. The Petitioner and his counsel were also acutely aware that if the trial court suppressed the evidence prior to trial, the State could and would appeal pursuant to Ohio Criminal Rule 12(J) and, more than likely, prevail as it has as of October 16, 1991.

In short, the State wanted a "James Hearing" to establish that a conspiracy existed and lay a foundation so that the State could present its evidence at trial. This "James Hearing" is so called based upon United States v. James (5th Cir. 1979), 590 F. 2d 575.

For obvious reasons, the defense in this case did not want to have a "James Hearing" and, therefore, consciously refused to raise any objections prior to

trial in an effort to defeat the State's right to appeal any possible adverse ruling which would suppress the evidence in this case.

Petitioner boldly claims on page 15 of his petition that, "Ohio Criminal Rule 12(J) does not authorize mid-trial appeals on its face. This is the first time the State used Ohio Criminal Rule 12(J) to take a mid-trial appeal." While this may be true, Ohio Criminal Rule 12(J) does not prohibit a mid-trial appeal either. In fact, Ohio Criminal Rule 12(J) and Ohio Revised Code Section 2945.67 (Pet. Appendix, pp. A25, A27) appear to permit the State to appeal a suppression of the evidence whenever it occurs. Nonetheless, case law prior to the Ohio Supreme Court decision in this case, unreasonably and inexplicably, limited such appeals to pre-trial



situations.

Therefore, it is obvious that the Petitioner and his counsel believed that if they could delay ruling on the "James" issue in this case until trial, the State's right to appeal under Criminal Rule 12(J) and Ohio Revised Code Section 2945.67 would be destroyed.

To counter these overt and conscious manipulations of the State's right to seek review of a potentially erroneous and devastating ruling on this issue, the State filed, prior to trial, a Notice of Intention to Use Evidence, a Motion to Compel the Defense to File Objections, and a Brief in Support of Admitting Evidence Through Statements Made by Co-conspirators in Furtherance of the Conspiracy in an effort to seek a ruling on the admissibility of its evidence.

The Motion to Compel the Defense to

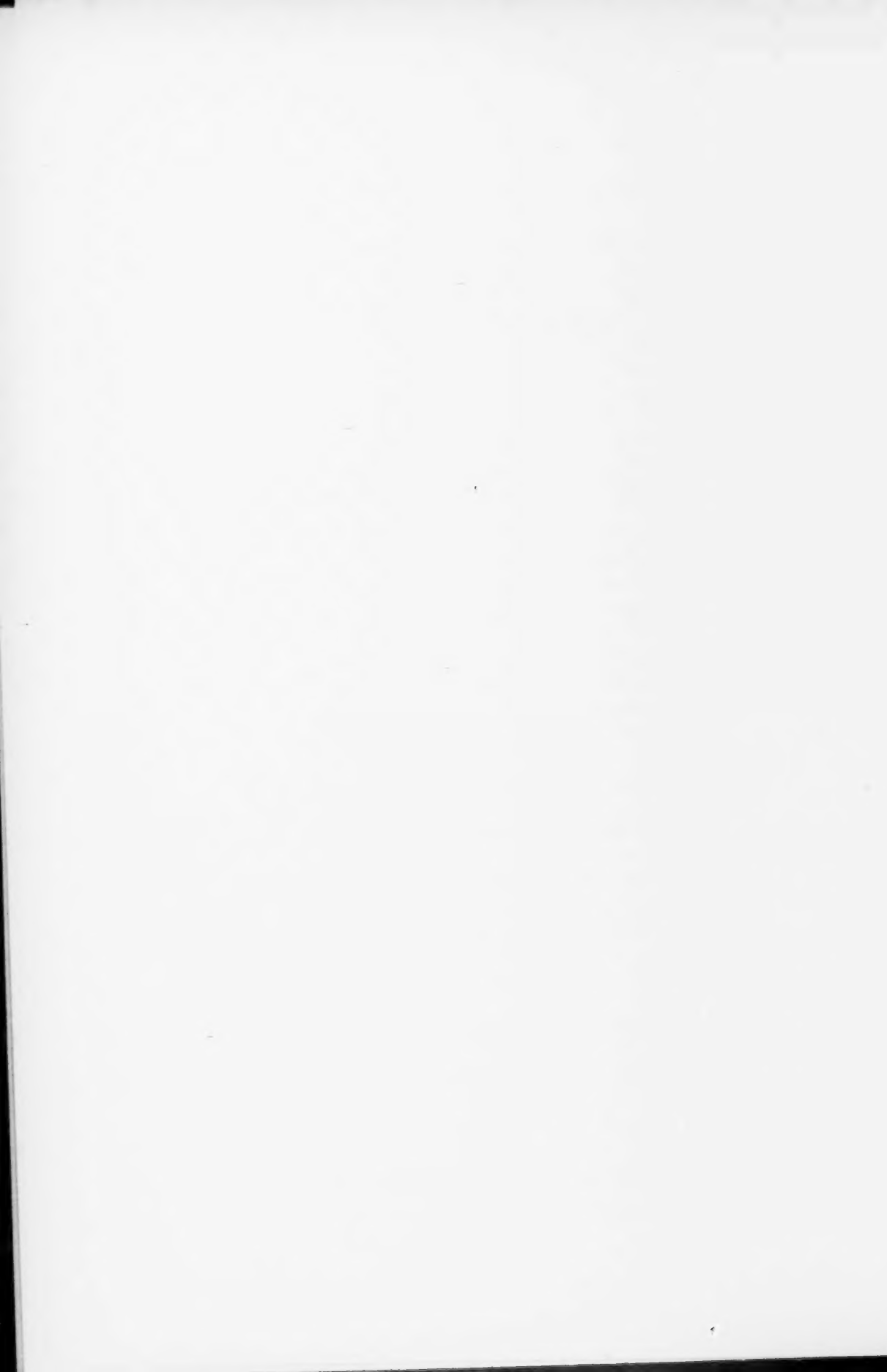


Raise Objections specifically challenged:

It is the position of the State that the procedure set forth in Criminal Rule 12 is to facilitate the administration of justice and the flow of a criminal trial. The defense is willfully ignoring the State's Notice of Intention to Use Evidence and the mandates of Criminal Rule 12 that come into play upon the filing of such notice. The defense is taking such inaction in an effort to defeat the appellate rights granted the State pursuant to Ohio Criminal Rule 12(J). Such conduct is not only inconsiderate to the Court but will result in the delay of trial, and if this Court should rule against the State, perhaps even an attempt to perfect a mid-trial appeal.

Despite these steps taken by the State to avoid any mid-trial delay and have the Petitioner's guilt or innocence determined by the same tribunal, the defense opposed the "James Hearing" and forced the mid-trial appeal complained of in the Petition.

Therefore, the termination of this



trial prior to a determination on the merits was caused by a significant level of conscious and manipulative participation by the Petitioner. The Supreme Court of Ohio so found on page 24 of its Opinion. The Supreme Court of Ohio held that the objection at the trial was enough to defeat the Petitioner's claims of Double Jeopardy. However, the real " participation" of the Petitioner, which caused the dismissal was the misrepresentations concerning and refusal to properly litigate these issues prior to trial.

The State did not refuse to proceed at trial. It could not do so because the trial court suppressed all of its evidence.



ARGUMENT

I.

The Petitioner continues in the body of his petition to refuse to recognize his participation/manipulation of the events which gave rise to the dismissal of this case for want of prosecution at trial. He attempts to build upon these claims by stating that he did not request the dismissal of this case and that the dismissal was not, in fact, labeled a mistrial by the judge. He then goes on in an effort to capitalize upon these misrepresentations by distorting this Court's holding in United States v. Scott (1978), 473 U.S. 82, 98 S.Ct. 2187.

Both the Ohio Supreme Court and the Ninth District Court of Appeals have determined that the trial judge erred in ruling on the issues of whether the State could appeal and whether the State did,

in fact, establish a conspiracy so that the State could present the evidence that the trial court excluded.

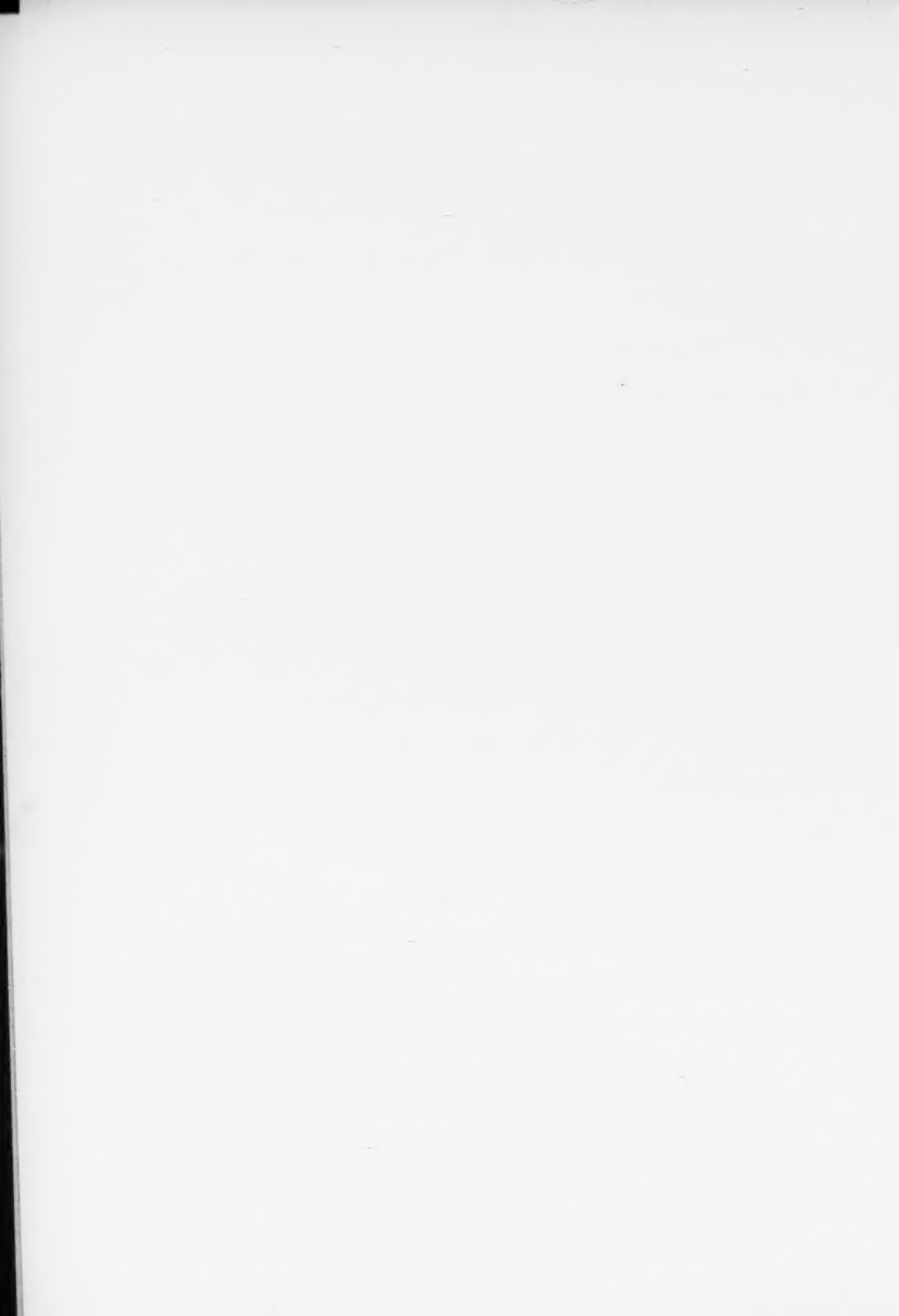
The Petitioner, now, wants this Court to be bound by the label this same trial court placed upon the termination of this case. The Petitioner obviously feels that if the termination of this case is labeled a dismissal and not a mistrial, the rationale espoused by this Court in United States v. Scott, supra, has no application. "[T]he trial judge's characterization of his own action cannot control the classification of the action." United States v. Scott, supra, at 96, 2196 quoting United States v. Jorn (1971) 400 U.S. 470 at 478, 91 S.Ct. 547 at 554.

Indeed, under Ohio Law, the trial court had no jurisdiction to proceed and enter the dismissal for want of

prosecution after the notice of appeal was filed. State v. Malinovsky (1991) 60 Ohio St. 3d 20 at 24; State v. Mitchell (1975) 42 Ohio St. 2d 447 at 449; State v. Watson (Lucas Co. 1975), 48 Ohio App. 2d 110 at 113-114.

Petitioner obviously feels that if he can continue to mask the fact that he prevented the State from raising these issues prior to trial in an effort to destroy its recognized right to appeal, he can claim the dismissal was neither requested by him nor is he responsible for it when his is.

The fact that the trial court wrongfully dismissed this case and discharged the jury without jurisdiction to do so should not inure to the detriment of the State. This is especially true when it happened as a result of the Petitioner's attempting to



manipulate the State's right to appeal a wrongful suppression of the evidence which occurred during the trial.

Scott clearly deals with a defendant who has successfully obtained not a mistrial but a termination of the trial in his favor before any determination of factual guilt or innocence. Unlike the typical mistrial, the granting of a motion such as this obviously contemplates that the proceeding will terminate then and there in favor of the defendant. The prosecution, if it wishes to reinstate the proceedings in the face of such a ruling, ordinarily must seek reversal of the decision of the trial court.

Scott, supra at 94, 2195.

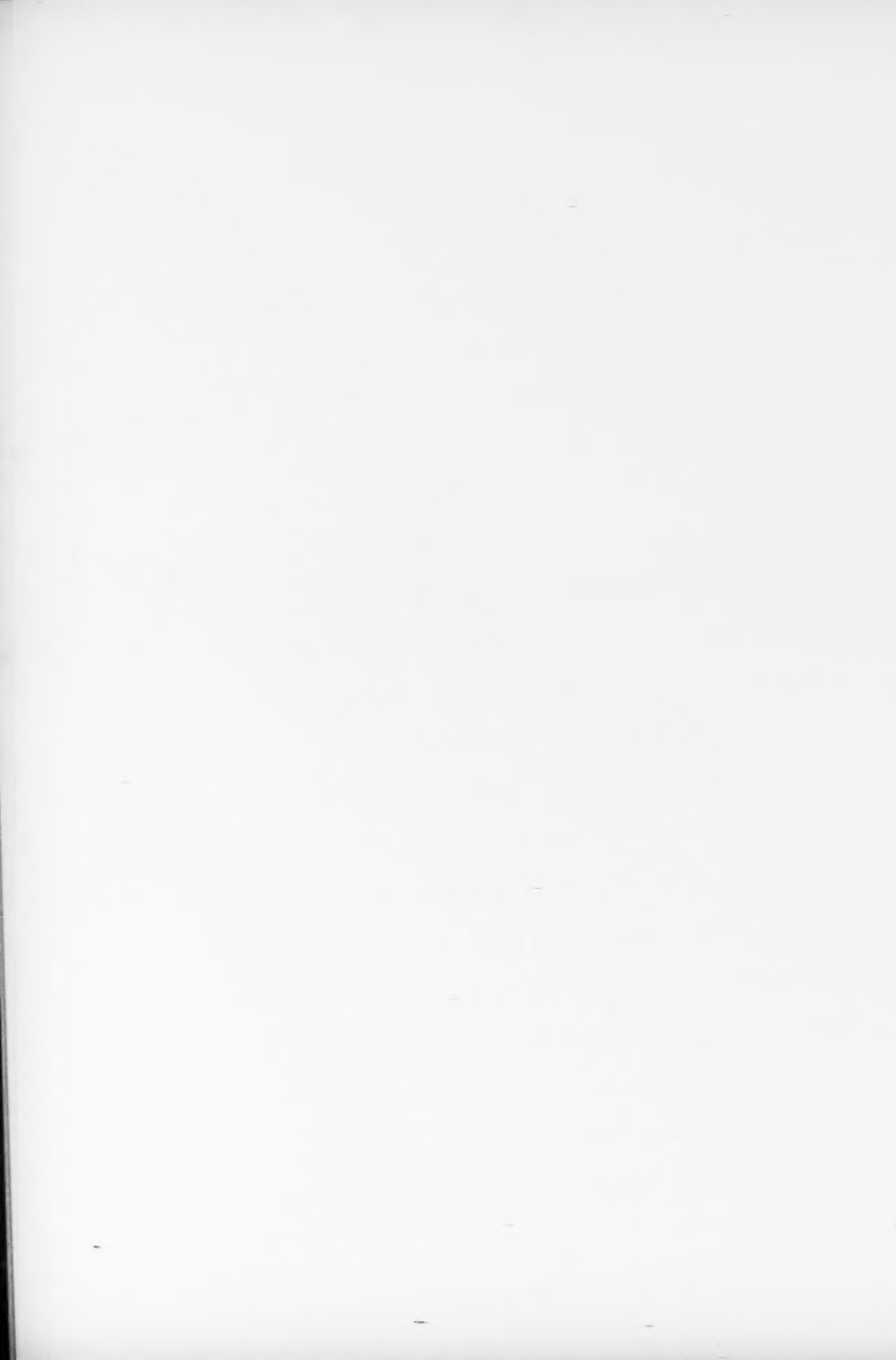
The Petitioner in this case successfully obtained a termination of the trial through his conscious refusal to litigate the suppression issue before trial and consciously chose to label his efforts to thwart the State's evidence as an objection rather than a motion to



suppress. The rationale of Scott is clearly applicable to this case.

While it may be that the Petitioner merely caused but did not move for the dismissal, it is clear that the State did not request the dismissal either. The end result was the necessity of a mid-trial appeal caused by the Petitioner's refusal to litigate the issues prior to trial, which resulted in a suppression of the evidence that the State sought to adduce. This "mere objection" and the deliberate timing thereof after the commencement of the trial was a motion to suppress pursuant to Ohio Law and forced the State to file a Notice of Appeal. State v. Malinovsky, supra at 405; State v. Davidson (1985), 17 Ohio St. 3d 132.

Therefore, despite Petitioner's claim, he has caused the dismissal in



this case because his objections lead to rulings which have been held erroneous and were tantamount to a motion to suppress. These rulings made at the behest of the Petitioner prevented the State from proceeding and caused the dismissal of this case. The trial judge's erroneous dismissal of the case was entered without jurisdiction as a result of the Petitioner's refusal to litigate the issues prior to trial in an attempt to defeat recognized appellate rights. The rationale of Scott is, therefore, applicable to this case and the Double Jeopardy Clause does not prohibit the re-trial of the Petitioner. Indeed, the State sought to continue the same trial after it appealed the ruling the trial court entered on the objections lodged by the Petitioner.

The Petitioner should not be heard



to argue semantics by calling his motion to suppress an objection made at trial in an effort to defeat the State's recognized right to appeal prior to trial.

II.

In the second part of his petition, Petitioner claims that Ohio Criminal Rule 12(J) does not authorize mid-trial appeals and that the delay of a mid-trial appeal violates the Due Process Clause.

Again, the Petitioner attempts to argue he is without responsibility for the delay caused by this appeal. His position obviously is weakened by the fact that he caused the mid-trial appeal. It is further weakened when one considers that the delay was no longer as a result of the mid-trial than it would have been had the appeal been taken pre-trial.



Petitioner must concede that he would have no argument had he objected to the admission of this evidence and a pre-trial appeal was taken.

However, this issue has been clearly resolved by this court in Scott:

No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceeding in a manner favorable to the defendant.

Scott, supra at 100, 2198.

Here, "the lessons of experience" indicate that Government appeals from midtrial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without "enhancing the possibility that even though innocent he may be found guilty."

Scott, supra at 101, 2199 quoting Green v. United States (1957), 355 U.S. 184 at 188, 78 S.Ct. 221 at 223.



The Petitioner should not be permitted to claim that he did not "request" the dismissal when his objection and his refusal to litigate the issue prior to trial was a conscious effort to defeat the State of Ohio's recognized right to appeal.



CONCLUSION

The State of Ohio requests this Court to take jurisdiction of this case in order to make it clear that mid-trial appeals of rulings that effectively emasculate the State's case by suppressing its evidence are not violative of the Double Jeopardy Clause. Further, the State requests this Court to accept jurisdiction of this case to make it clear that the Government has a right to appeal a suppression of the evidence whenever it occurs before the final determination of guilt. If a trial judge dismisses such a case it is a mistrial for double jeopardy purposes.

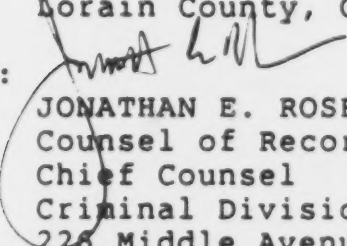
However, the State requests this Court not to stay the proceedings taking place in the trial court. The Petitioner has delayed this trial long enough and desires to do so longer so that the

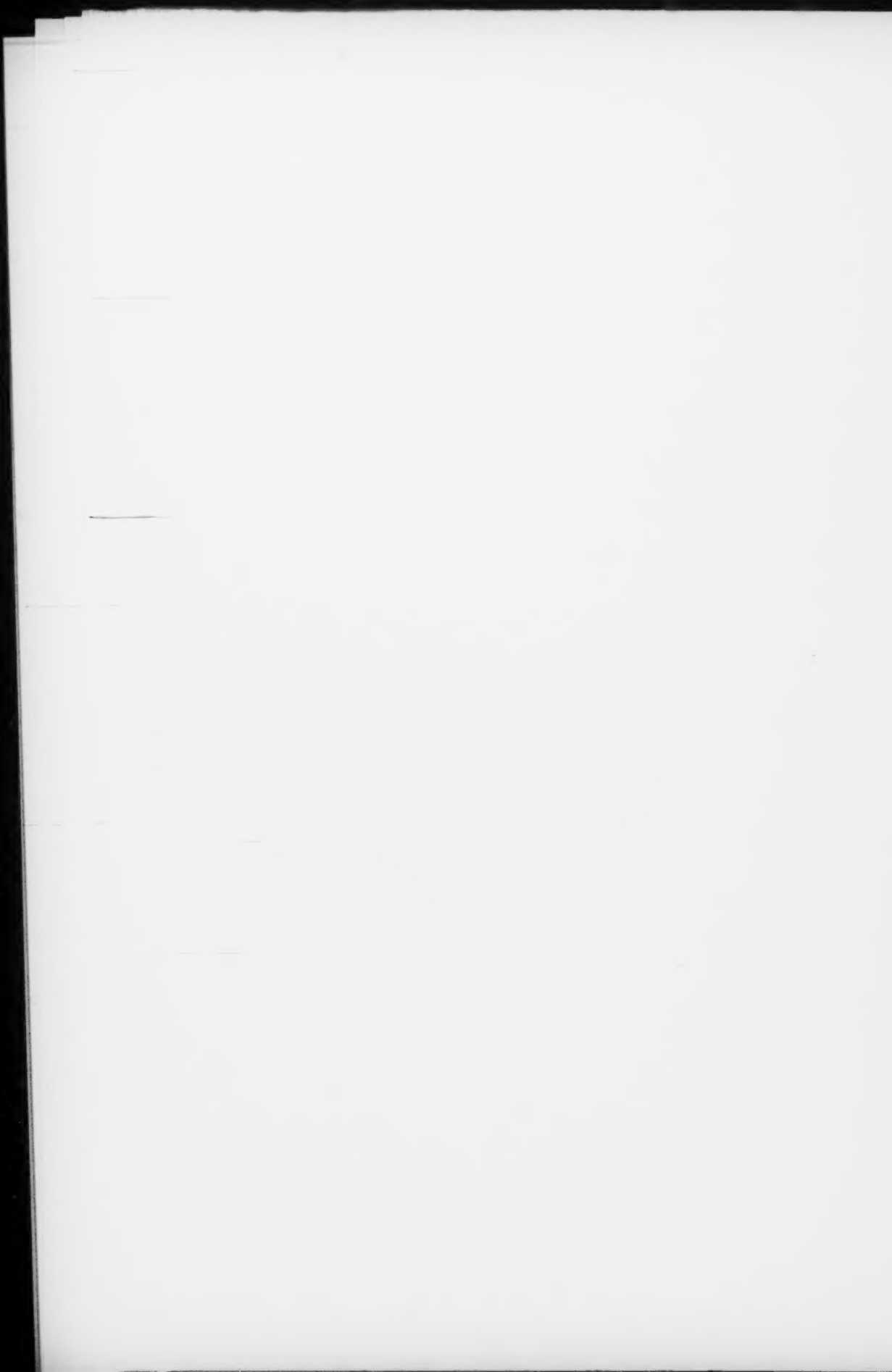
State's case will fall apart due to the passage of time. Acceptance of this case without staying the trial of this matter would benefit the Petitioner and the State simultaneously and is consistent with Ohio Law concerning pre-trial issues of Double Jeopardy. State v. Crago (1990), 53 Ohio St. 3d 243 559 N.E. 2d 1353.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

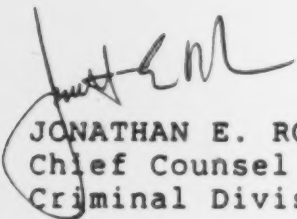
By:


JONATHAN E. ROSENBAUM
Counsel of Record
Chief Counsel
Criminal Division
226 Middle Avenue
4th Floor
Elyria, Ohio 44035
(216) 329-5393



CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum, hereby
certify pursuant to U.S. Sup Ct. R. 28.3
that three copies of the foregoing Brief
in Opposition were sent to Daniel G.
Wightman, Attorney at Law, 110 Moore
Road, Avon Lake, Ohio, 44012, on this
4 of November, 1991 by depositing the
three copies in a United States mail box
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JONATHAN E. ROSENBAUM,
Chief Counsel
Criminal Division